

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIMBERLINE FOUR SEASONS
RESORT MANAGEMENT CO., INC.,
and LONG RUN REALTY, INC.

Petitioners Below, Appellants

v.

PAT J. HERLAN, individually,
TIMBERLINE REALTY, INC, and
TIMBERLINE RESORT REALTY, INC.,

Respondents Below, Appellees.

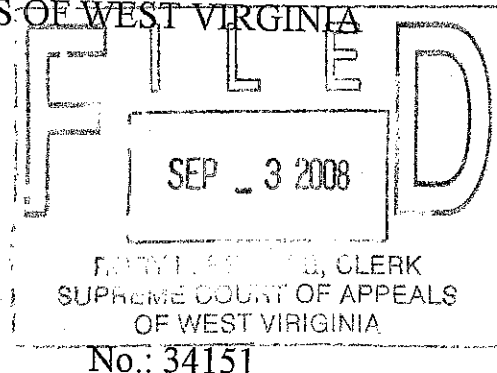
APPELLANTS' REPLY TO APPELLEES' REPLY BRIEF

Come now, Appellants, by counsel to Reply to Appellees' Reply Brief.¹ Taking each of Appellee's arguments in turn, Appellee Pat J. Herlan was paid by Timberline Four Seasons Management Company, Inc. Second, the telephone numbers and records obtained by Ms. Herlan were obtained as a part of her agency relationship and therefore, belong to her principal.

Looking back to the written employment agreement between Timberline Four Seasons and Ms. Herlan from 1995, it is clear that Ms. Herlan was more than a promoter, in fact she was not a promoter at all.² The scope of Ms. Herlan's work was clearly set out in that agreement:

¹ Appellees' Reply Brief is actually a Response.

² The 1995 Employment Contract is attached to the "Petition For Injunctive Relief" as Exhibit A, filed below and designated as part of the record herein.



Your primary responsibility is the supervision of all activities related to Timberline Realty office, including both the real estate sales function and the rental function. Specific responsibilities in this area include the following:

1. All broker functions under West Virginia law.
2. Timely financial reporting to the Owners on realty activities (monthly financial statements by the 15th of each month in agreed upon format)
3. Community relations on realty activities (e.g. broker association work, etc.)
4. Customer relations work to assure a successful service oriented business.

1995 Employment Agreement, pg 1. After 1996, Ms. Herlan did not have a written agreement with Timberline Four Seasons, however, her work was the same, and there is no evidence that her pay changed.

The 1995 agreement does not indicate that one of Ms. Herlan's responsibilities is repairing Timberline's reputation, in fact all of her duties are directly related to executing Timberline's realty operation. The agreement clearly spells out that her "community relations" work is on "realty activities."

Ms. Herlan's position, both here and below, that she was a promoter lack any documentary support. In fact, the only support for that theory is Ms. Herlan's self serving testimony. Testimony, which is not only unsupported by other evidence, but countered by the documentary evidence available below. Ms. Herlan continued to get paid after 1996, she continued to perform all of the same functions that she did before. The persons working in the realty office were still paid by

Timberline Four Seasons, and Timberline Four Seasons still oversaw the operating account, and day to day operations of the realty office. Ms. Herlan was an agent and an employee.


Appellee's further reliance on WV Code §47-12-1 et. seq. is misplaced. This topic is more fully addressed in Appellants' Brief, however, it bears mention that Ms. Herlan was an agent of Timberline Four Seasons, she then absconded with its records. Timberline Four Seasons then secured another broker to fill the void left by Ms. Herlan. Ms. Herlan's contention that Timberline's conduct is illegal, is severely undercut by the fact that it is the exact conduct in which Ms. Herlan engaged in for the past sixteen years. The application of WV Code §47-12-1 et. seq. has no bearing in this case because Timberline Four Seasons hired Ms. Herlan to act as its agent.

The phone numbers are addressed more fully in Appellants' Brief. It simply bears mention that Ms. Herlan obtained those numbers as Timberline Four Seasons' agent. For her to now claim them as her own is the epitome of self dealing as Timberline Four Seasons has advertised and promoted those numbers for years.

For sixteen years Ms. Herlan was a paid employee and agent of Timberline Four Seasons. Appellee uses the word "symbiotic" to describe their relationship. When Timberline Four Seasons wished to sever that relationship and replace her,

the very job that she had been performing became illegal. The relationship that she shared was no longer permissible, so she stole the records and phone numbers, crippling her principal's business.

Timberline Four Seasons Resort
Management Co., Inc. and Long Run
Realty, Inc. - Appellants
by counsel,



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CERTIFICATE OF SERVICE

I, John J. Wallace, IV, one of the counsel for Appellants, hereby certify that the foregoing Appellants' Reply to Appellees' Reply Brief was served upon counsel of record on this 2nd day of September, 2008 by depositing a true and correct copy thereof in the United States Mail in a postage paid envelope addressed as follows:

Stephen G. Jory, Esq.
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A handwritten signature in black ink, appearing to read "John J. Wallace, IV", is written over a horizontal line.

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